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THE MODEL ACT'S DIVISION OF ADMINISTRATIVE PROCEEDINGS INTO RULE-MAKING AND CONTESTED CASES

Ralph F. Fuchs†

For the purpose of prescribing minimum procedural requirements for administrative agencies, the Model Administrative Procedure Act in effect divides their proceedings into the now-familiar categories of rule-making and adjudication, the latter being designated as proceedings in contested cases. Although these categories have long been conventional in discussions of administrative procedure, their utility has been questioned—not without reason if precise, unvarying procedural consequences attach to the assignment of a given proceeding to one category or the other. For the differences that exist among such varied instances of administrative rule-making as the imposition of a local contagious disease quarantine and the fixation of minimum wages in an industry or of maximum interest rates on bank deposits are surely more significant for procedural purposes than the resemblances; and the same may be said as to such variant “adjudications” as the disposition of an application for old age assistance, the determination with regard to a certificate of convenience and necessity for a bus line, and the decision of a professional disbarment proceeding. It behooves us to inquire, therefore, whether the model act is not rendered unsound and unworkable by its attempt to lump together such diverse elements and to legislate for them en masse.

The answer to our inquiry depends, of course, upon two factors: the definition which the act gives to the categories in question and the use which it proceeds to make of them.

As to the first factor, the act is at least verbally specific. "'Rule' includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amend-

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ment or repeal thereof, adopted by an agency . . . to implement or make
specific the law enforced or administered by it or to govern its organiza-
tion or procedure," 2 except regulations concerning only an agency’s in-
ternal management. 3 " 'Contested case' means a proceeding before an
agency in which the legal rights, duties, or privileges of specific parties
are required by law or constitutional right to be determined after an
agency hearing." 4

It has been pointed out that the distinction between these two types
of action may be quite formal and meaningless. 5 Railroad rate orders
identical in effect may, if governing statutes permit, be promulgated
either as general directions or as orders addressed to named railroads.
Why then attach significance for procedural purposes to a difference
that, being purely one of expression, ought not to have practical con-
sequences? The objection has also been raised to classifying administra-
tive proceedings into rule-making and adjudication, that such a division
is based upon separation-of-powers concepts. These, it is said, have no
application to proceedings conducted by a single agency, often through
the same set of officials. Why should procedural differences within an
agency turn upon the superficial resemblance of some of its functions
to those performed by legislatures and of others to those carried on by
courts? 6

The answer to the first of the foregoing objections, which must be
more fully developed below, is that if legislation is to deal with adminis-
trative procedure on a statewide basis it must do so in terms of some
classification of proceedings, unless it is possible to lay down uniform
requirements, and that the classification adopted by the model act, even
though its basis is formal, is appropriate and useful. The answer to
the second objection turns upon the latter branch of the answer to the
first: the classification employed in the act must be judged on a practical
basis and not on the basis of its real or supposed resemblance to separa-
tion-of-powers categories. Any such resemblance is, if not wholly co-
incidental, at least entirely irrelevant. 6

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2 Model State Administrative Procedure Act § 1(2). (Reprinted infra p. 372.) Rule-making is not defined; the act refers to the "adoption" of rules.
3 Model State Administrative Procedure Act § 1(3).
4 Timberg, supra note 1, at 79; Fuchs, Concepts and Policies in Anglo-American Administrative Law Theory, 47 Yale L. J. 538, 545 (1938).
5 Davis, supra note 1, at 1113-6.
6 It is, of course, true that the exercise of "quasi-legislative" and "quasi-
judicial" powers by agencies in the executive branch of government has been thought
to be anomalous because of its seeming violation of the separation of powers and
that it has frequently been set down as the distinguishing characteristic of ad-
ministrative, as over against ordinary executive, agencies. 59 A. B. A. Rep. 541
Before the attempt is made to deal with the specific merits and demerits of the classification into rule-making and adjudication, notice should perhaps be taken of the possible objection that this classification is bad because any separation of administrative proceedings into broad categories would be bad. In this view, the evil lies in legislating for administrative procedure on a general basis at all, since any attempt to do so necessarily involves lumping unlike things together and imposing a harmful uniformity upon them. Regulation of insurance is unlike regulation of banking, and both are vastly different from public health regulation and the administration of social security. Why not recognize, then, that the differences are more significant than the resemblances and leave the regulation of procedure to statutes that operate separately within each field of administration and that can be adapted to the circumstances actually existing there? Commissioner Robert M. Benjamin stated this view convincingly in his report on Administrative Adjudication in New York, coming to the following conclusion:

My description of diversity in existing procedure has, I believe, shown more than the extent of change that a general procedural code would bring about. It has shown that much of the existing diversity exists for reasons that are not merely valid but inescapable. Thus a uniform procedure would be impossible, if it were thought desirable.8

(1934). Cf. Fuchs, supra note 4, at 541-3, 548, 550; Fuchs, An Approach to Administrative Law, 18 N. C. L. Rev. 183-6, 193-4 (1940). Administrative rule-making and administrative adjudication have been singled out for investigation partly because they have been considered functions that were questionable from a separation-of-powers standpoint. REPORT OF THE COMMITTEE ON MINISTERS' POWERS, Cmd. 4060 at p. v (1932) (the Committee's "Terms of Reference"). That the separation of powers has no relation to the allocation of rule-making and adjudication among the departments of government and that the performance of these functions within the executive branch cannot be considered a distinguishing mark of administrative agencies is part of the thesis of Fuchs, supra. Historically these functions have long been performed by agencies in the executive branch. Cf. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 7-11, 97-100 (1941). Notwithstanding their frequent coexistence, they may be distinguished for purposes of study—although it may, of course, be contended that the distinction is not a useful one. See Fuchs, Procedure in Administrative Rule-Making, 52 Harv. L. Rev. 259 (1938).


81 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN NEW YORK 35 (1942). Mr. Benjamin doubtless had in mind, however, a more detailed code of procedure than that contained in the model act, which he played a helpful advisory role in framing.
One cannot, I think, refute this view as to any governmental unit in which legislation is sufficiently well drafted, with enough conscious thought of procedural considerations, to result fairly consistently in statutes that provide clear, fair, and workable procedures for their administration. Even the best standardized suit of clothes is probably inferior to one that is expertly tailored to fit the particular wearer. So it must be in regard to the adjective side of laws establishing administrative agencies. And legislative methods falling considerably short of perfection may nevertheless yield statutory procedures that work better in particular fields if they are not subjected to a general code than will a legislative scheme that casts administrative procedures even partly into a single mold. This observation may be true of the federal system, which may come to suffer more than it will benefit from the operation of the new Administrative Procedure Act; and the same might be true of the State of New York. Recognition of such a possibility in any state is implicit in the fact that it is a model act, not a uniform act, we are discussing. As such the act is not urged upon the states for adoption but is offered for their use in whole or in part, in the belief that its provisions will be found workable and in many instances will result in improvements as compared to the operation of previous legislation.

In most American states, as is well known, legislation has on the whole been far from expertly drafted. From the standpoint of administrative procedure, the results leave considerable to be desired. This is true even from the practical standpoint of a lawyer attacking a problem, as against the somewhat academic approach of procedural "surveyors" who, when they attempt to gain an over-all comprehension of administrative processes in a state, are bewildered and baffled by the diversity confronting them. In actual operations no one needs to learn all of the administrative procedures of a state. Rarely is the lawyer confronted with more than one set of procedures at a time. Even over a period, he and his client engaged in a business can probably get along with knowledge of the ways of four or five agencies at most—knowledge which it is fairly easy to come by, if not through books then through inquiry and corres-

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9 Uniform acts are urged upon the states for adoption in order to bring about uniformity in the law of the subjects covered, usually for economic, social, or administrative reasons; model acts, likewise prepared by the National Conference of Commissioners on Uniform State Laws, are proposed for adoption when desirable. Cf. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTY-THIRD ANNUAL CONFERENCE 144, 146 (1943) and, as to the Administrative Procedure Act in particular, id. at 83-6.
10 REPORT OF THE ADMINISTRATIVE LAW COMMISSION TO THE GOVERNOR AND GENERAL ASSEMBLY OF THE STATE OF OHIO 10, 63 (1942).
Mere variety in the administrative procedures prevailing in a state therefore hardly affords a reason for tampering with them by general legislation. The difficulties that exist in most states, however, go beyond the existence of differences, whether needless or not. They extend to the absence from some statutes of provisions enabling suitable hearings to be held or insuring opportunity for prompt determination of questions of legal right, as well as the presence in statutes of unwise provisions limiting or needlessly enlarging judicial review.

In areas of administration in which such procedural deficiencies exist, the application of the model act should confer considerable benefit. The same benefit would flow in larger measure from careful, piece-by-piece revision of state regulatory statutes, having in mind the policies embodied in the model act and also the needs of sound administration in the fields with which particular statutes deal—such a job as was done, for example, in the revision of the New York Insurance Law as a result of the elaborate study directed by Professor Patterson of the Columbia University School of Law. Short of such major operations, a good deal of improvement might be accomplished by mere textual revision of statutes after discussions with administrators and with affected interests in the light of general considerations bearing upon administrative procedure. Such developments are not to be expected on a large scale in the predictable future, however—not so long as state legislatures lack adequate staff services or, in bad years, the funds to provide them. The question here is, therefore, whether in the absence of better remedies such improvement as the model act may accomplish will be purchased at too high a price in terms of difficulty of application and harmful restriction of some administrative proceedings because of the act’s

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11 Compare, however, the statement of Dean Vanderbilt that "... it is not only difficult but actually impossible in many instances to determine what is the existing law of the administrative agencies." N. Y. U. SCHOOL OF LAW INST. PROC., THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES AT p. iii (Warren ed. 1947). Dean Vanderbilt’s statement embraces substantive as well as procedural regulations, however, and is strikingly true as to the former, more frequently than as to the latter, in relation to some state agencies.

12 See, e.g., the inadequate notice provisions in some of the statutes authorizing license revocation proceedings, outlined in JUDICIAL COUNCIL OF CALIFORNIA, TENTH BIENNIAL REPORT 78 (1944). See also the same report’s summary of available judicial review proceedings in California at 133-45. The REPORT OF THE ADMINISTRATIVE LAW COMMISSION TO THE GOVERNOR AND GENERAL ASSEMBLY OF THE STATE OF OHIO 62 n. 10 (1942) states that 22 of the 62 statutes in that state authorizing license revocation made no provision for a hearing. As to the desirability of according a hearing in license revocation, see 1 BENJAMIN, op. cit. supra note 8, at 104-5.

13 See BENJAMIN, THE INSURANCE DEPARTMENT 5 in 2 ADMINISTRATIVE ADJUDICATION IN NEW YORK (1942).
adoption of the broad categories of rule-making and proceedings in contested cases.

The formulation of the Federal Administrative Procedure Act encountered the difficulty that the categories of rule-making and adjudication as employed in the preliminary stages of drafting yielded unsatisfactory results. At that stage these categories were defined substantially as are those of the model act. Procedural requirements were stated for each category. Objections were raised by government agencies to which the draft was sent for comment, to the effect that requirements which the act attached to adjudication would present serious difficulties when applied to some of their proceedings falling within that category. The solutions adopted were (1) so to broaden the definition of rule-making and correspondingly to narrow the definition of adjudication as to throw these proceedings into the former category, and (2) to limit most of the requirements for adjudication to instances "required by statute to be determined on the record after opportunity for agency hearing," instead of simply after opportunity for hearing. The requirements as to procedure in rule-making, even when required to be on the record after opportunity for hearing, were at the same time so formulated as to be free of the objections raised against the former

14 Legislative History of the Administrative Procedure Act, Sen. Doc. No. 248, 79th Cong., 2d Sess. 156-7 (1946): "(c) 'Rule' means the whole or any part of any agency statement of general applicability designed to implement, interpret, or prescribe law or policy . . . . 'Rule making' means agency process for the formulation, amendment, or repeal of a rule. (d) 'Order' means the whole or any part of the final disposition or judgment . . . of any agency, and 'adjudication' means its process, in a particular instance other than rule making but including licensing." The draft's principal procedural requirements for adjudication were attached to only such proceedings as are " . . . required by statute to be determined after opportunity for an agency hearing . . . ." (§ 5 of federal act).


17 Id. at 4, 21, 219, 226 (first sentence of § 5 of federal act).
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adjudicative procedure. In addition, the action of agencies upon initial license applications was excepted from some of the requirements attaching to other forms of adjudication upon the record after opportunity for hearing. The act emerged with five major categories of proceedings to which procedural requirements were attached: rule-making required by the provisions of other statutes to be upon the record after opportunity for hearing; rule-making not attended by such a requirement; adjudication required to be upon the record after opportunity for hearing; initial actions upon license applications required by other statutes to be taken upon the record after opportunity for hearing; and adjudication not required to be upon the record after opportunity for hearing. In the process of adaptation of the act, rule-making was transformed from a category of proceedings eventuating in general prescriptions into a class which includes, as well, proceedings that lead to agency "statements" of "particular applicability and future effect," including all instances of "approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing."

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28 Id. at 6, 30, 32, 221 (last sentences of §§ 7(c) and 8(a) of federal act).
10 Ibid.; id. at 4, 24, 220, 282 (last sentence of § 5(c) of federal act). Proceedings to recover reparation from public utilities and carriers were also excepted from § 5(c).
19 Rule making is defined in § 2(c) of the federal act.
20 No attention is given in this discussion to the words "future effect," which are included in both the federal act's and model act's definitions of "rule." Their meaning is unclear and it is difficult to envisage practical consequences that might attach to them. They do not exclude interpretative regulations, which are specifically included and which do have future as well as retroactive effect. They do not distinguish rules from specific orders which, like judgments, also necessarily operate in futuro. Probably the intention, not aptly translated into words, is to distinguish pronouncements which are thought to rest mainly upon policy considerations applicable to the future, including all general rules and, in the federal act, many pronouncements of "particular applicability," from those that rest upon considerations relating to past conduct, like cease-and-desist orders. Under the federal act some distinction not based on the form of agency statements is necessary, or else the category of rule-making swallows up that of adjudication. In the model act, on the other hand, "rule" is adequately defined without reference to the words "future effect," which seem to add nothing.
21 The federal act allows great procedural freedom with reference to both rule-making and adjudication not required by other statutes to be based upon a record after opportunity for hearing. As to proceedings that must be so based, rule-making as defined and the determination of applications for initial licenses are freed from the following mandatory requirements, applicable, with minor exceptions, to formal adjudication: nonconsultation by the hearing officer with any person...
In the face of this history, it is natural to ask whether the simplicity of the classification retained in the model act is not delusive. Conceptually fairly clear, it could nevertheless be a cover for strange bedfellows in the procedural lodging. And so, it must be conceded, it is; but the bed is not so Procrustean as to preclude adaptation to the needs of the various denizens who must lie upon it; and it does afford a foundation for somewhat greater repose than in recent years has attended the attempts of administrative procedure to settle down to a satisfactory state of affairs. Justification of this conclusion requires analysis, first, of the procedural requirements that give trouble if too great uniformity is attempted, and second, of the precise requirements which the model act imposes.

The most striking difficulties envisaged by the federal agencies with regard to the original draft of the federal act related largely to two points: the "separation" requirement for adjudication which threatened to insulate hearing officers and deciding authorities in certain types of cases too largely from sources of needed information and advice within their agencies, and the requirement that, in cases where a formal adjudicatory or rule-making hearing is held by an official other than the final deciding authority, the decision must be based upon an initial or recommended decision by the hearing officer, to the exclusion of a tentative decision prepared by other officials and without possibility of omitting such a preliminary determination altogether. A single reason lay behind both of these objections—namely, the need of bringing to bear in certain situations the full resources of agency staffs. These staffs are assembled for the very purpose of supplying knowledge and expert judgment in the handling of critical matters. If their contributions in formal proceedings must be brought into play by the process of testimony in open hearings and must filter through to the deciding authorities principally by means of a document prepared by the hearing officer, serious obstacles are placed in the way of mobilizing the agencies' full resources in reaching conclusions.

As matters have been worked out in the federal act, the bulk of the administrative proceedings to which staff contributions need to be made as to any fact in issue, except upon notice and opportunity for all parties to participate, together with nonparticipation at the hearing stage or afterward, except as witness or counsel, of agency personnel engaged in investigative or prosecuting functions in the same or a related case (§ 5(c)); freedom to each party to present his case by oral or documentary evidence as he sees fit (§ 7(c)); formulation by the hearing officer of either an initial or a recommended decision (§ 8(a)).

22 See note 21 supra.
23 Ibid.
are defined as rule-making or, if they present instances of initial action upon license applications, are specifically excepted from the objectionable requirements attaching to other types of formal adjudication. In these proceedings, whether they eventuate in general prescriptions or in orders of particular applicability, as well as in all other instances of rule-making upon the record after hearing, the hearing officer and the deciding authority may consult with other members of the staff of the agency; and the agency may dispense with any intermediate report upon finding "that due and timely execution of its functions imperatively and unavoidably so requires" or, without such a finding, may substitute a tentative decision prepared in some other way for an initial or recommended decision by the hearing officer. In this way, a measure of procedural flexibility is provided and the way is left open for the knowledge and judgment of agency staff members to come into a proceeding through various forms of advice and through a tentative decision in which many may have collaborated.

The model act does not contain procedural requirements giving rise to the more serious difficulties mentioned above, which arose out of the original draft of the federal act. Like the federal act draft, it does not attach the hearing requirement to rule-making. Unlike the latter, it does not, except in one minor respect, contain the provisions attaching to adjudication and formal rule-making, the inclusion of which in the federal draft was said to threaten difficulty in proceedings originally subject to strict adjudicative procedure. There is no prohibition of consultation by hearing officers and deciding authorities with agency staff members. It is provided in Paragraph (2) of Section 9 that "All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case"; but it is clear that this provision does not bar the possibility of consultation as to policies and general knowledge. Although Section 10 does not permit a recommended or tentative decision to be omitted entirely in cases in which "a majority of the officials of the agency who are to render the final decision have not heard or read the evidence," it lays down no requirement as to the personnel that shall prepare the "proposal for decision, including findings of fact and conclusions of law," which must

24 Text at note 21 supra, p. 216.

25 Note 19 supra and text supra, p. 216.


27 Cf. the provisions as to official notice, below.
be served upon the parties in order to afford them opportunity "to file exceptions and present argument to a majority of the officials who are to render the decision . . . ." The agency may invoke the services of such staff members as it desires.

Avoidance of the pitfalls that beset the drafters of the Federal Administrative Procedure Act is, however, a negative virtue in the model act. To establish the value of the model act's classification of administrative proceedings, it is necessary to consider its specific provisions in relation to the agency functions that fall within each of its broad categories.

As to procedure leading to the adoption of rules, the act contains no requirement whatever, except the provision of Section 5 that any interested person may petition an agency for the promulgation, amendment, or repeal of any rule and that each agency shall provide a procedure for the submission, consideration, and disposition of such petitions. Each agency is admonished in Paragraph (3) of Section 2, however, "so far as practicable, in its discretion," to "publish or otherwise circulate notice" of the intended issuance of regulations, other than those concerning only its internal management, and to "afford interested persons opportunity to submit data or views orally or in writing." Section 3 provides that such regulations are not to become effective until filed with the secretary of state or other designated official; and Section 4 provides for the publication of administrative regulations by the same official in periodical bulletins and in standing compilations.

The procedure in contested cases, or adjudications required to be made "after an [opportunity for] agency hearing," is prescribed in Sections 8 to 11. Opportunity for hearing shall be given by reasonable notice, which shall specify the issues involved if this is feasible at that stage. If notice of the issues is not feasible at that stage, or if the issues are amended later, they are to be "fully stated as soon as practicable." Opportunity shall be afforded all parties to present evidence and argument. An official record, including all evidence, shall be prepared; but documentary evidence may be received and incorporated by reference; and transcription of shorthand notes is not required "unless requested for purposes of rehearing or court review." Evidence may be admitted and given effect when it "possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs." "Incompetent, irrelevant, immaterial, and unduly repetitious evidence" may be excluded. "Every party" shall have the right to cross-examine "the witnesses who testify" and to submit rebuttal evidence. No "factual information or evidence" may come in except via the record; but, upon due notice and opportunity for rebuttal, agencies "may take notice of
Judicially cognizable facts and . . . of general, technical, or scientific facts within their specialized knowledge; and they "may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them." Unless "a majority of the officials of the agency who are to render the final decision" have "not heard or read the evidence," the decision may follow the initial hearing without further proceedings; but if a majority of deciding officials must learn of the case at second hand, the "proposal for decision" procedure previously mentioned must be followed. A majority of deciding officials must then receive argument and "personally consider the whole record or such portions thereof as may be cited by the parties." Provision is made, however, for the optional exemption of agencies by name from the proposal-for-decision procedure. Decisions shall "be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law"; and parties shall be notified of them in person or by mail, with complete copies upon request.

The act contains no provision for judicial review of rules, which is left to pre-existing procedures; but provision is made in Section 12 for petitions to court to secure review of decisions in contested cases, with an optional provision to preserve additional methods of review afforded by pre-existing law. The scope of review in the proceedings authorized by the act is set out in Paragraph (7) of Section 12. It adheres to the formula which has now become general, except possibly for the provision that a decision may be reversed or modified if it is "unsupported by competent, material, and substantial evidence in view of the entire record as submitted."

Here, it is submitted, is a set of statutory provisions designed realistically to work improvement in the administrative procedures of numerous agencies in many states without imposing hampering restrictions, and to secure a due measure of judicial review of decisions with recognition of the expertness that should reside in the administrative process. Contributing materially to the structure thus created is the separation of rule-making from the decision of contested cases, coupled with the procedural freedom allowed as to the former and the imposition of fundamental requirements upon the latter which yet permit considerable flexibility. Some drawbacks are present in the scheme, as will appear; but they are a minor price to pay for the contribution the scheme can make to administration.

The reasons for according procedural freedom in rule-making, stemming from the nature of the operations involved in formulating general
regulations, have been stated before\textsuperscript{28} and need only be outlined briefly here. The content of regulations necessarily lies partly in the discretion of the agency devising them, since the very reason for authorizing their issuance instead of incorporating fixed rules in the governing statutes is to enable administrative judgment to shape them. The permissible content of most regulations is subject to great variation, with a multiplicity of choices lying within the limits of possibility. Many recurring situations will be governed by the regulations, and consequently affected interests are likely to be numerous and not always identifiable as individuals whom it is possible to summon to meetings. Hence the questions presented in a rule-making proceeding are both numerous and many-sided. Rarely are they susceptible to yes-or-no answers, and the technique of litigation is ill-adapted to resolving them. Inquiry and discussion, rather than trial and decision, are the primary methods to be employed; but just how these are to be carried on varies from problem to problem. Occasionally the impact of regulations upon specific interests is sufficiently clear and direct to warrant according some of the rights of litigants to those interests; but for the most part the field investigation or the questionnaire and the conference, rather than testimony and cross-examination followed by a verdict, form the preferable way of reaching a result. No suitable method, from the most exploratory to the most litigious, is barred from use in rule-making by the model act. The door must be kept open to interested persons to request action and the text of regulations must be officially available; but beyond these requirements the choice of method in rule-making is left to the agencies by the act.

It might be argued that differentiation within rule-making should be attempted in such a procedural statute as the model act, so as to require regulations to be based upon the record of hearings in wage- and price-fixing, and kindred types of action, since such a hearing requirement has become fairly common in statutes vesting such functions in administrative agencies. But it is as yet far from certain that a desirable procedural pattern has been evolved in relation to such functions.\textsuperscript{29} In any event, the statutes bestowing such powers are not so numerous as

\textsuperscript{28} Final Report of the Attorney General's Committee on Administrative Procedure 299 (1941) (note to § 209(g) of the bill proposed by the minority). For the same reasons, the majority's bill contained no requirements as to rule-making procedure. Chapter VII of the Report contains an account of the variety of procedures actually employed in federal administrative rule-making. The pattern in the states is substantially similar.

to discourage specific revision for the purpose of introducing any needed procedural changes; and, indeed, most of them are of sufficiently recent origin to have had considerable thought given to procedure in their original formulation.\textsuperscript{30} The model act, therefore, properly leaves procedure in these fields to further experimentation at the hands of legislatures and administrative bodies.

Some of the same factors as form the basis of procedural freedom in rule-making are present in some of the proceedings classified as adjudication, as was emphasized in the preparation of the Federal Administrative Procedure Act. The regulation of utility rates; the issuance of certificates of convenience and necessity or of authorizations to establish new banks; decisions as to appropriate units for collective bargaining in labor relations;\textsuperscript{31} and decisions as to the soundness of issues of securities or of the financial condition of regulated corporations may involve policy questions similar to those in rule-making. Often general considerations, involving more than the particular case, form the principal question for decision. Here, it may be argued, the agency is hampered if its procedure is confined to the methods of adjudication, and it should therefore be as free as in rule-making to rely upon procedures that will

\textsuperscript{30} Attention has been given to procedure in rule-making only in recent years and has accompanied both administrative practice and the formulation of economic regulatory legislation during that time. \textit{Report of the Attorney General's Committee on Administrative Procedure} 101 n. 23 (1941); cases cited in Fuchs, \textit{supra} note 29. State minimum wage regulation has been largely revived in new statutes since the decision in \textit{West Coast Hotel Co. v. Parrish}, 300 U.S. 379 (1937), which overruled earlier cases holding such measures to be unconstitutional. Regulation of the interest rates and practices of commercial banks is older and is conducted informally, but has given rise to few procedural problems. \textit{Benjamin, The Banking Department} 8-10, 52 in \textit{2 Administrative Adjudication in New York} (1942). Price fixing applicable to marketing of agricultural products and service trades has been established by statutes of recent date which generally contain detailed procedural provisions. See the summaries in \textit{Works Progress Administration, State Price Control Legislation}, 2 \textit{Marketing Laws Survey} 385-494 (1940).

procure the data needed for sound decisions. But the conclusion is a
non sequitur. In such cases the fate of specific parties necessarily has
been placed in issue and demands procedural protection, even while the
need exists for methods that are suited to the broader questions involved.
The two are not inconsistent, since the procedure for contested cases
does not preclude the effective use of studies and investigations, the
results of which may come into the record, or, if sufficiently general,
may be used to enrich that "technical competence and specialized knowl-
edge" which the agency is authorized to employ in reaching a decision.
It is precisely at this point that the model act shows its greatest strength.
At the same time as procedural protections are accorded to the parties
involved, the way is left open for documentary material, official notice,
and expert knowledge to guide the discretionary determinations that
need to be made.

Even the most clearly adjudicative type of proceeding, like many
cases in court, may in reality involve primarily, or at least as a pro-
minent secondary consideration, the determination of some question of
general policy. Thus in a workmen's compensation case the issue of
whether the accident arose out of or in the course of the employment
often turns, not upon a conclusion as to the facts of the particular case,
but upon whether a given type of situation, such as the injury produced
by a scuffle with a fellow employee or the injury incurred on the way
to work, should be held to be covered. The major premise for the de-
cision, and not just the minor, is up for consideration.32 The facilities
for its wise determination should be available so far as possible in what-
ever type of proceeding it arises; and any legislation which introduces
procedural safeguards to affected interests, whether specific or general
in its coverage, should be framed with consciousness of the danger of
attaching blinders to eyes that should see policy clearly. The model act
is no exception in this regard; but neither has it succumbed to the
danger. The liberal standard as to admissibility of evidence; the limit-
ation of the guaranty of the right of cross-examination to witnesses who
testify, thus excluding the guaranty as to the compilers of documents

32 The issue formally drawn in SEC v. Chenery Corp., 67 Sup. Ct. 1575, 1760
(1947), is whether a new major premise, not previously announced, was properly
made a basis of decision by the SEC in that case. The opinion of the Court when
the case was previously before it left that question in doubt. 318 U.S. 80, 86-95
(1943). The second opinion of the Court enunciates a broad charter for adminis-
trative agencies to adopt general regulations or to develop policy case by case in
their discretion, to the extent that legislative authorization permits. They have
done so throughout their history. Cf. Columbia Broadcasting System v. United
and reports unless they testify orally;\(^3\) and the broad provisions for
official notice and use of technical competence and specialized knowl-
dge,\(^4\) do much to harmonize the hearing procedure in contested cases
with the needs of policy determination.

It is true that the act requires a full-record proceeding, accompanied
by a limited array of formalities, in all instances in which a right to
a hearing in connection with an adjudication is secured by statute and
an informal disposition is not reached. The very term "contested case,"
which is applied to all such proceedings, is suggestive of an atmosphere
and of characteristics that often should be avoided and in some instances
are repugnant to the purpose of the governing statutes and their ad-
ministration. In social security administration generally and in many
fields of license issuance and revocation there is little or nothing in the
nature of a contest involved in making the determinations which the
statutes require. There is no interest adverse to the private interest that
is being advanced, but only a duty on the part of the agency to see to
it that statutory conditions to the enjoyment of benefits are fulfilled.

\(^3\) Due procedure may in particular situations, of course, require an opportunity
for parties adversely affected to cross-examine the author of written evidence,
whether or not the right is secured by statute. The relevant principle is expressed
in the Senate and House reports upon the Federal Administrative Procedure Bill
with reference to the last sentence of § 7(c). SEN. DOC. NO. 245, 79th Cong., 2d
Sess. 208-9, 271 (1946). The extent to which the recent tendency to broaden the
admissibility of official documents and reports even in judicial proceedings carries
with it diminution of the opportunity for cross-examination depends partly upon
the conception of what constitutes such admissible material. Compare the broad
wording of the American Law Institute's Model Code of Evidence, Rule 515,
admitting reports made by officials in the performance of their "functions," with
the conception expressed in Amory v. Commonwealth, 72 N.E. 2d 549 (Mass.
1947), restricting admissibility to material required by law to be published. As
to admissibility in administrative proceedings, cf. 1 BENJAMIN, ADMINISTRATIVE
ADJUDICATION IN NEW YORK 176-7, 197-8, 200-5 (1942); DAVIS, AN APPROACH TO
PROBLEMS OF EVIDENCE IN THE ADMINISTRATIVE PROCESS, 55 HAST. L. REV. 364, 397-401
(1942); Hoyt, SOME PRACTICAL PROBLEMS MET IN THE TRIAL OF CASES BEFORE AD-
MINISTRATIVE TRIBUNALS, 25 MINN. L. REV. 545 (1941).

\(^4\) These provisions, coupled with the requirement that all evidence be made of
record, point up the problem that would be present in any event, of what is
"evidence" that must be introduced as such and what, on the other hand, is in-
formation suitable to be "noticed" or used as a basis for judgment by an
administrative agency without having to come in as evidence. This problem has been
much discussed: e.g., 1 BENJAMIN, OP. CIT. SUPRA NOTE 33, AT 206-21; FINAL
REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 71-3, 398-
403 (1941); GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 82-99 (1941); DAVIS,
supra note 33, at 402-16; BOARD OF INVESTIGATION AND RESEARCH, REPORT ON
PRACTICES AND PROCEDURES OF GOVERNMENTAL CONTROL, H. R. DOC. NO. 678, 78th
Cong., 2d Sess. 70-8, 200-35 (1944).
At the hearing stage as before, the agency may follow a policy of helpfulness rather than of opposition to the claimants before it. Even in this type of situation, however, the act’s safeguards may be useful; and its requirements need not be onerous even in those simpler cases in which, for example, recorded findings of fact and conclusions of law seem hardly appropriate.

If the issues in a proceeding are simple and nontechnical, so may be the notice of the hearing. Recording the testimony may seem a cumbersome formality when many small cases are heard; but it avoids duplication of hearings if the matter is carried farther and, without transcription, scarcely imposes an excessive burden. The right of cross-examination will rarely be asserted except where there is a genuine contest and can in any event be limited to reasonable scope. Like the notice, the findings of fact and conclusions of law may be simple if the case itself is—although here the forms will certainly be unnecessarily cumbersome if all that can be done is to delineate the obvious: Mary Smith must be found to be the mother of a dependent child, Katie Smith, maintaining a suitable family home for Katie and needing assistance in the amount of $20.00 a month which, when added to all other income and support available to the child, will produce an amount, having due regard to the resources and necessary expenditures of the family, sufficient to provide Katie with a reasonable subsistence compatible with decency and health—instead of simply receiving an award of the same amount for Katie’s support. But the form can be printed, with appropriate blanks. None of these procedural requirements seriously threatens the basically informal, nontechnical character of proceedings which an agency wishes to conduct in a friendly manner, free of the characteristics of litigation.

The safeguards which the act’s contested case procedure accords to affected private interests are at the same time substantial and by no means certain of realization apart from the act’s provisions. Specificity

35 There may, for example, be rival claimants to survivors’ benefits in workmen’s compensation or other social security proceedings, or the agency itself may feel called upon to oppose actively a claimant who is thought to give indications of being a malingering impostor.

of notice of the issues to be met in particular is overlooked quite often; the requirement of Section 8 for rules of procedure is valuable and in no sense burdensome. The certainty that the basis of decision will be embodied in a record affords a security against obscurity which is rarely reason to withhold. The requirement of a proposal for decision in advance of the decision, in case he who hears does not decide, has become elementary since the late thirties. Its inclusion in the act sets a procedural pattern which is usually desirable and may afford a basis for securing legislative appropriations to provide the necessary personnel.

The scope of judicial review which the act provides is adequate and probably as clear as a statutory formula can make it. The statutory procedure is simple. By reliance upon the administrative record as the

37 See the discussion and the authorities cited in Gellhorn, Administrative Law, Cases and Comments 263-80 (2d ed. 1947).

38 The provision of § 12(7) of the act, limiting reversal of administrative decisions to situations in which "the substantial rights of the petitioners may have been prejudiced," should prevent reversals for inadequate notice when timely correction was afterward made or prejudice is not shown.

39 In at least one type of situation, however, the requirement that the decision must be based upon a record may be unwise. In the licensing of banks and other financial institutions the administrative agency is commonly directed to take into account the character of the applicants and their capacity to engage in the business. Inquiry into these matters can scarcely be conducted by the hearing method, nor is it intended that it should be even when the governing statute provides for a hearing as to other aspects of the problems presented. See, e.g., Ind. Stat. Ann. §§ 18-222-5 (Burns 1933). Compare Ill. Stat. Ann. § 10.02 (Jones 1947); Iowa Code §§ 524.11-3 (1946). Iowa Code § 534.9 (1946) relating to building and loan associations, by providing for an appeal to court from a refusal of authorization, contemplates that the grounds of refusal may be made a matter of record. Cf. Benjamin, The Banking Department 12-24, 52-3 in 2 Administrative Adjudication in New York (1942).

40 This is the apparently enduring result of the famous Morgan litigation (Morgan v. United States, 298 U.S. 468 (1936); Morgan v. United States, 304 U.S. 1 (1938))—in particular of Morgan II—after other pronouncements and holdings of the Court in Morgan I and Morgan II have been discounted in the light of subsequent criticism or repudiation by the Court itself. Acceptance of the requirement has come about largely through administrative action and legislative prescription.

41 The exception provided in § 8(a) of the Federal Administrative Procedure Act for rule-making and determining applications for initial licenses, permitting this procedural step to "be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires," is useful in complicated proceedings in which speed is required and the issues have been sufficiently aired in the initial hearing. The absence of a similar exception in the model act is not of great importance, however.
basis for the reviewing court's action, economy of effort is achieved. In only one respect is any questionable threat likely to be found in the review provisions to effective administration in any of the proceedings that are grouped under the heading of contested cases. The power of a court to reverse or modify the administrative conclusion because of lack of support by "competent, material, and substantial evidence upon the whole record as submitted" extends to the foundation for "inferences, conclusions, or decisions" as well as "findings." In proceedings in which a discretionary determination has been made, opportunity is thus given to the reviewing court to rule out as baseless in the evidence a conclusion of policy (such as the undesirability of permitting abandonment of a railroad station) for which the court finds inadequate warrant.42 Such decisions should, of course, be subject to a measure of judicial review; but a court in overturning them should be compelled to assert their arbitrariness or capriciousness as a basis for its action, rather than being enabled to rely upon evidentiary legalisms. The act, however, as has been pointed out, stresses the permissible role of agency "experience, technical competence, and specialized knowledge" in the administrative determination of such matters—a feature which should strengthen the tendency to "judicial self-limitation" in performing the reviewing function. In view of the terms of the act as a whole, the risk is worth taking.

All in all, then, the model act's employment of the categories of rule-making and adjudication appears to result in a workable procedural scheme, imposing few restraints that are unduly restrictive. At the same time it establishes desirable safeguards for affected interests, coupled with efficient methods, in proceedings that call for care and restraint. The freedom allowed in rule-making permits employment of the safeguards otherwise attaching only to adjudication, where these seem called for. No assumption is made that procedures in the performance of the two main types of functions are necessarily and inherently different. The need for procedures carefully designed to fit particular problems can in all probability be met by most administrative agencies in all but a few states more successfully under the terms of the act than would be the case without it. Where adequate procedure already prevails, as is quite generally true, for example, of public utility regulation and social security administration, the act will largely reaffirm existing practice; but exceptions can and should be made when the act is adopted, so as to exclude agencies having a satisfactory procedure, if the act threatens impairment of their methods.